STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2014-00214

January 14, 2015

MAINE PUBLIC UTILITIES COMMISSION
Amendments to Licensing Requirements, Annual Reporting, Enforcement and Consumer Protection Provisions for Competitive Provision of Electricity (Chapter 305)

ORDER ADOPTING RULE AND STATEMENT OF FACTUAL POLICY BASIS

VANNOY, Chairman; LITTELL, Commissioner

I. SUMMARY

In this Order, we adopt amendments to the Commission's Chapter 305 governing licensing requirements, annual reporting, enforcement, and consumer protection provisions for competitive electricity providers (CEPs). Over the last several years, there has been a significant increase in competitive activity involving residential and small commercial customers. This increased competitive activity highlighted the need for a review of the provisions of Chapter 305. Accordingly, this rulemaking has focused primarily on amendments to the consumer protection provisions of the rule, as well other changes based on our experience in implementing the rule.

II. BACKGROUND

On April 9, 2013, the Commission initiated an Inquiry into existing rules and practices related to residential and small commercial customer standard offer and competitive electricity provider services, as well as the possible need to address customer protection issues in light of the increase in competitive activity for residential and small commercial customers. *Inquiry Into Residential and Small Commercial Customer Standard Offer Service And Customer Protection,* Docket No. 2013-00200 (April 9, 2013). On November 12, 2013, the Commission issued its conclusions on the issues raised in the Inquiry. *Inquiry Conclusions,* Docket No. 2013-00200 (Nov. 12 2013). Among those conclusions, the Commission stated:

> As a result of the recent increase in CEPs marketing and providing service to residential and small commercial customers, the NOI requested comment on whether the Commission should review and consider changes to its customer protection rules (Chapter 305 § 4). The major concerns that have arisen with increased residential competition have been:
>
> - Misleading or inaccurate comparisons with standard offer prices
> - Misrepresentation of association with the utility
> - Automatic renewals at different terms

- o Transfer of customer accounts among CEPs
- o Disparate supplier/customer obligation regarding fixed terms

Accordingly, the Commission reopened the customer protection provisions of Chapter 305 to consider: 1) requirements that any comparison with standard offer include the term length for both standard offer and the CEP offer; 2) prohibitions on promotional or marketing activities to prevent overt or implicit suggestion that a CEP is associated with a utility; 3) prohibitions on automatic renewals without affirmative customer consent if the price or other significant terms (e.g., length of contract term) are changed; 4) prohibitions on the transfer of customer accounts to another CEP at different terms without customer consent; and 5) a requirement that any contract that binds customers for a particular term also bind the supplier for a same term.

A Notice of Rulemaking was issued in this docket on July 24, 2014, proposing amendments to Chapter 305. The Notice was provided to all CEPs licensed in the State and all transmission and distribution utilities. A public hearing was held on September 3, 2014, where the Commission received comment from the Office of the Public Advocate (OPA); Constellation New Energy, Inc. (Constellation), Electricity Maine, LLC, (EM), Central Maine Power Company (CMP), Gulf Oil, LLP (Gulf), Norman Viger, and Peter Brush. Written comments were filed by CMP, EM, the OPA, Mr. Brush, Gulf, the Retail Energy Suppliers Association (RESA), Emera Maine (Emera), North American Power and Gas, LLC (NAPG), C.N. Brown Electricity, LLC (Brown), and Mr. Viger. We address each of the proposed amendments and comments in turn below, and describe how the proposed amendments will be reflected in the final rule.

III. PROPOSED AMENDMENTS

A. Scope of Rule (Section 1(A))

The proposed rule clarified that the term “competitive electricity providers” includes marketers, brokers, and aggregators, and the rule removes language that refers to “any entities selling electricity at retail.” We received no comments on this section and therefore adopt the proposed amendment as drafted. A similar change was made to the definition of “competitive electricity provider” in section 1(B)(7) of the rule.

B. Definitions (Section 1(B))

The proposed rule contains amendments to several definitions. The definition of “complaint” is changed so that it applies to all aspects of the rule, not just consumer protection provisions. The proposed rule added a definition of “GIS certificates.” Finally, the proposed rule included a definition of “variable rates and charges” as a rate or charge that is defined by an index or formula. RESA filed comments highlighting inconsistencies between the proposed definition of “variable rates and charges” and the usage of that term in other sections of the rule. We address those comments below and adopt a modified definition and a new definition, namely a

definition of an “Indexed Variable Rate or Charge” and a definition of a “Non-indexed Variable Rate or Charge.”

C. Financial Disclosures (Section 2(B)(1)(a))

The proposed rule included an amendment to the licensing procedure for the financial disclosure requirement. This amendment provides flexibility in the required demonstration of financial capability by allowing documentation other than the most recent financial disclosure under some circumstances. We received no comments on this section and therefore adopt this amendment as drafted in the proposed rule.

D. Financial Security (Section 2(B)(3))

The current rule specifies that a CEP that serves residential or small commercial customers must post financial security (in the form of cash or a letter of credit) in an amount equal to ten percent of the prior year’s revenue from sales to those customers. The proposed rule added a provision, requiring that CEPs provide a report on the prior year’s revenue from residential or small commercial customers on March 1st of each year and submit updated security based on that report. The Commission sought comment on whether the financial security provision should be modified. Specifically, the Commission sought comment on: whether the amount of the security should continue to be based on a percentage of revenues; whether the security amount should be capped in some way; whether the amount of the security should depend on the nature of service (e.g., existence of deposits or prepayments); and whether the financial security provisions should apply to CEPs that serve medium and large customers, as well as residential and small commercial customers.

Regarding application of the financial security provisions to medium and large customers, CMP supported it, arguing that these CEPs are no less likely to fail to repay a customer deposit or act in a manner that would result in imposition of an administrative penalty than CEPs that serve residential and small commercial customers. Emera Maine also supported extending the financial security requirement to medium and large customer CEPs for similar reasons as CMP. RESA opposed this change in its reply comments, arguing that contracts between CEPs and large or medium customers typically have bilateral credit terms which serve to protect customers in the event of CEP default on the contract.

We agree with the underlying premise of RESA’s comment, that is, that contractual provisions negotiated by large and medium customers provide a reasonable means for these customers to protect their interests. The customer-protection benefits of extending the financial security provisions to medium and large customers would be outweighed by the regulatory burden. Accordingly, we have not amended the proposed rule to extend the financial security requirement to medium and large customer CEPs.

With respect to the amount of financial security, NAPG and EM state that 10% of revenues is grossly excessive. They state that the amount of the security

should be based on the nature of the service of the CEP, for example, whether the CEP holds customer deposits or prepayments, or—with respect EM—whether service is offered at a fixed rate. Absent deposits and prepayments, NAPG and EM state that a security requirement capped at $250,000 would be sufficient to protect the interests of customers.

In the Commission's experience, however, improper CEP charges placed on customers' bills can accumulate quickly, exacting significant monies from customers with regard to what an individual customer is paying for monthly electricity consumption, as well as with regard to the total amount collected from a customer class as a whole. Thus, the proposed cap of $250,000 does not adequately balance the need to protect customers and the cost to suppliers of posting the security. Accordingly, we will maintain the requirement that the financial security posted shall equal the lesser of 10% of revenues or $1,000,000.

We also adopt the provision at section 2(B)(3)(c) in the proposed rule that requires each CEP to submit a report annually on March 1st that provides its revenues from sales to residential and small residential customers during the prior calendar year and provide updated security based on that level of revenue.

Finally, the proposed rule also makes a clarifying change to the use of security amounts. The current rule states that financial security amounts may be distributed to customers for restitution of money that was "unlawfully obtained." The proposed rule changes this language to amounts paid "in violation of the applicable terms of service, statute or rule." NAPG stated this clarifying change was acceptable, we otherwise received no comments on this proposed requirement, and therefore adopt this amendment as drafted in the proposed rule.

E. Disclosure of Enforcement Proceedings and Customer Complaints (Section 2(B)(4)(c))

The current rule requires applicants for a CEP license to disclose enforcement proceedings and customers complaints in other jurisdictions. The proposed rule specified that the disclosure of customer complaints must be "by state and customer class." We received no comments on this section and adopt it as drafted in the proposed rule. The OPA submitted a comment, urging the Commission include disclosure of customer complaints as an on-going annual report requirement. This comment is discussed below with regard to section 2(E).

F. Agent for Service (Section 2(B)(8))

This provision of the proposed rule added an affirmative requirement that CEPs demonstrate to the Commission that they have an agent for service of process located in Maine. CMP recommended that, in addition to indicating this on their application, CEPs be required to reaffirm this requirement as part of their annual reports. While we appreciate CMP's concern that this information be kept up to date, this provision is intended to assist the Commission in serving process on CEPs, but

does not otherwise replace other existing regulatory provisions designed to protect the consumers of the State of Maine. *See*, *e.g.*, 5 M.R.S. § 108 (change of clerk or registered agent by entity). Accordingly, we adopt the requirement as contained in the proposed rule.

G. Application Information (Section 2(B)(9))

The proposed rule specified that certain of the required information in the license application include a mailing address and contact person's e-mail. We received no comments on this section and adopt it as drafted in the proposed rule.

H. Licensing Conditions (Section 2(C)(2))

As a condition of licensing, CEPs must provide the Commission notice of any substantial changes in circumstances from those documented in the license application. The current rule specifies that this notice must be provided within six months. Because the timeliness of such information could be important to the Commission's oversight of the retail electricity market, the proposed rule stated that the notice should be provided within 30 days.

RESA commented that a 60-day reporting obligation would allow sufficient time to report the most accurate and complete set of information to the Commission, implying that the proposed 30-day period would be either too short or unduly burdensome. Similarly, NAPG commented that a 30-day period would likely cause operational problems for many suppliers, stating 60 days would be a more reasonable and workable period. We find RESA's and NAPG's proposal to be reasonable and adopt a 60-day time period in our final rule.

I. Licensing Procedures (Section 2(D))

The proposed rule contained non-substantive updates to the licensing procedure provisions of the rule. These include removing the requirement that hard copies be mailed to the Commission and the OPA, and that applications be notarized. The proposed rule also increased the time period for the Commission to review license applications. Although the vast majority of applications are processed quickly (within 30 days), there are occasional applications that require several months to review. We received no comments on this section and adopt the amendments as drafted in the proposed rule.

J. Annual Reporting (Section 2(E))

The proposed rule contained several changes to the annual reporting section of the rule. These include specifying that the annual report be submitted using the form from the Commission's website and that the report include the revenue and sales information broken out not only by customer class but also for each discrete pricing product. Specifically, section 2(E)(1)(a) of the proposed rule would require

CEPs to provide average prices, revenues, sales and number of customers for each pricing product broken out by customer class.

RESA opposed these changes in its comments, arguing that they could result in the submission of competitively sensitive or otherwise confidential material if the intent is to require individually negotiated pricing products to be reported separately. RESA suggested that CEPs could provide information in the aggregate for all individually negotiated pricing products, and requests that the rule be clarified in this respect. RESA also recommended that, with respect to number of customers, that the rule specify that customer counts should be as of December 31st of the applicable annual report year.

On these two points, we agree with RESA. It was not our intent to require individually negotiated prices to be disclosed; but rather to require disclosure of the information for discrete pricing products that are generally available. Thus, we clarify the rule to reflect: (1) that individually negotiated prices should be provided in the aggregate; and (2) number of customers should be reported as of December 31st of the reporting period.

The proposed rule would also require that all Terms of Service documents produced pursuant to section 4(B)(1) that were in effect during the reporting period be filed, with an indication of the time period each was effective. RESA made similar arguments as above that this requirement could require disclosure of individually negotiated Terms of Service documents. Again, this was not our intent. Because the proposed rule would only require the filing of Terms of Service documents applicable to residential and small non-residential customers, the requirement is unlikely to result in the disclosure of individually negotiated documents. In the event a CEP has any individually negotiated terms of service with residential or small non-residential customers, it can seek to provide those pursuant to confidential or redacted treatment. Thus, we adopt these proposed changes as set forth in the proposed rule.

The proposed rule also specified that the CEP's resource mix must be based on certificates contained in a Maine GIS sub-account and the ISO-NE's residual system mix and that, for service in Northern Maine, resources shall be reported based on market settlement data or other relevant market data that match generating resources to load obligation. For purposes of this provision, the proposed rule specified that the resources used for service in the ISO-NE control area and Northern Maine must be combined into a single resource mix. The Commission specifically sought comment on whether the use of the GIS-certificates for determining the resource mix that serves Maine's customers, as opposed to actual resources used by suppliers, is appropriate.

RESA commented in support of these provisions. CMP noted that, for Northern Maine, the market settlement data appears to be the only available option for determining resource mix. CMP also proposed that CEPs serving in both Northern Maine and the ISO-NE service territory provide separate resource mix labels for each region.

As proposed, the rule provided that, for service in Northern Maine, resources would be reported based on market settlement data or other relevant market data. CMP may be correct that market settlement data may be the only currently available option. The rule as proposed, however, would allow other approaches by which loads and resources could be matched, thus providing some flexibility. CMP also submitted comment, apparently referring to disclosure label requirements under Chapter 306. The purpose of the annual report requirements of Chapter 305, however, is to develop a state-wide energy mix. For these reasons, we adopt the changes to section E(1)(b) as set forth as in the proposed rule.

The proposed rule at section 2(E)(1)(h) also included a requirement that, if applicable, CEPs provide information demonstrating compliance with section 4(A)(7), which relates to the marketing of electricity attributes as being, for example, green or renewable. This issue is discussed below with regard to section 4(A)(7).

Finally, the OPA suggested that CEPs be required to include with their annual report filings the number of customer complaints from other jurisdictions. The OPA noted that such a requirement would be consistent with information required to obtain a CEP license and is a logical extension of the proposed requirement that CEPs report any enforcement proceedings in other jurisdictions. NAPG objected to this suggestion, stating the administrative burden of annually supplying this information would outweigh the limited value of such plain numerical data. We agree with the OPA. While numerical complaint data without submission of underlying documentation presents analytical limitations, the Commission has found the review of customer complaint data from other jurisdictions to be a useful investigatory tool and have adopted this requirement in our final rule.

K. Sanctions and Enforcement, Penalties (Section 3(A)(1))

The proposed rule added a provision at section 3(A)(1), expressly providing that penalties collected pursuant to the Commission's sanctions and penalties authority may be refunded to customers as directed by the Commission. We received no comment on this clarification, and adopt the rule as proposed.

L. Customer Protection, General Protections (Section 4(A))

The proposed rule added a provision (Section 4(A)(7)) governing the marketing of electricity attributes, such as "green" or "renewable" power. This provision specified that such marketing must be documented by NEPOOL GIS certificates or, for Northern Maine, market settlement data or other relevant market data that match generating resources to load obligation. The provision explicitly does not prohibit CEPs from marketing, promoting, and providing green or environmental products, such as renewable credits associated with resources that are not used to serve load in New England, as part of the provision of electricity services. The promotion of such products, however, may not state or suggest that that the electricity actually used to serve the customer has the stated attributes. The Commission requested comments on

whether this proposed provision appropriately distinguishes between the marketing of electricity actually provided to the customer e.g., green power, as opposed to marketing other green attributes such as renewable energy credits outside the NEPOOL Generation Information System (GIS).

RESA encouraged the Commission to strike this proposed amendment and to rely instead on existing federal and state laws that address green marketing and deceptive marketing claims. RESA states that these laws already prohibit CEPs from mischaracterizing the attributes of their product offerings. Similarly, NAPG filed comments stating that this proposed provision would be duplicative and confusing.

Although we acknowledge the existence of general safeguards in federal and state law regarding marketing, the provisions in the proposed rule are intended to provide a specific means by which the claimed attributes could be verified. As such, the requirements set forth in the proposed rule will provide additional value with respect to transparent disclosure of attributes, thus assisting customers in making informed decisions about the purchase of electricity products. For these reasons, we find the provisions to be appropriate and not duplicative of other legal safeguards that may exist and, thus, adopt section 4(A)(7) as set forth in the proposed rule.

The proposed rule also added a provision (Section 4(A)(8)) that requires CEPs to provide notice to potential customers of the existence of opt-out fees, pursuant to Chapter 301 of the Commission rules, that might apply if a customer commits to service from the CEP.

RESA and Gulf commented that this requirement should only apply to medium and large non-residential customers because the opt-out fee does not apply to residential and small commercial customers. CMP suggested that the Commission develop a standard form for this notice, including whether it could be oral or must be in writing. In its reply comments, NAPGA agreed with RESA, Gulf, and CMP, and suggested further that the notice make it clear that the opt-out fee was not a fee imposed by CEPs.

We agree with all these comments, and will reflect them in the final rule.

M. Customer Protection, Small Customer Protections (Section 4(B))

The proposed rule contained a number changes to the small customer protection provisions, which apply to service to residential and small commercial customers. These are addressed below.

1. Terms of Service Document (Section 4(B)(1))

At section 4(B)(1)(a) the proposed rule specified that the Terms of Service document shall constitute all contractual obligations between the CEP and the customer, and be in plain language and legible print. Proposed section 4(B)(1)(b)

required that the Terms of Service document be provided within seven days of agreeing to service (rather than 30 days under the current rule). At section 4(B)(1)(c), the proposed rule also contained a requirement that CEPs prominently display all effective Terms of Service documents on their webpages with an indication of their effective dates, and required the documents to be easily accessible on the webpage without any requirement that personal, customer-specific information be provided.

Regarding section 4(B)(1)(a), the OPA comments that the two sentences setting forth the obligations and responsibilities are redundant in part and could be clarified. We agree and have modified the two sentences for the purpose of clarifying the regulatory requirements with respect to Terms of Service documents.

With respect to section (4)(B)(1)(c), RESA and the OPA noted that requiring all effective Terms of Service documents to be posted could create customer confusion and make it difficult for customers to determine which of the many documents pertain to them. RESA suggested as an alternative that CEPs be required to display information online indicating how an individual customer can request a copy of its applicable Terms of Service document. The OPA suggested requiring CEPs to pair the effective dates of Terms of Service documents with a unique identifier which would make it more likely that a customer could quickly find its document.

With respect to RESA's proposed alternative, although we agree it could be useful, we do not find it to be a completely sufficient substitute for the provision in the proposed rule. Similarly, with respect to OPAs proposed alternative, it would also be a useful approach and we encourage CEPs to consider it on a going forward basis. The OPA's proposed approach, however, would not address existing terms of service and, in addition, could be difficult to enforce. Therefore, we adopt the provision as proposed. We expect CEPs to use best efforts to ensure that their webpages are designed such that confusion is minimized and Terms of Service documents are easily identified and accessed by customers.

Section 4(B)(1)(d) of the proposed rule required CEPs to provide a single document that contains, among other information, the applicable price term and length of obligation. Gulf opposes this requirement in its comments and suggests that its practice of sending a standardized set of terms and conditions of service that refers to a separate document referred to as a "Welcome Letter" containing the applicable price structure and term of obligation is sufficient under the assumption that the "Welcome Letter" is incorporated by reference. We disagree. The practice of binding small customers to contractual terms through Gulf's current practice is contrary to the central idea of this rule that such obligations should be set forth clearly in plain language and easily accessible . We find that incorporating other documents by reference, particularly documents that are not labeled in a manner that gives rise to their actual purpose, places an unreasonable and unfair burden on small customers. Accordingly, we decline to accept Gulf's suggestion and adopt this requirement as drafted in our proposed rule.

We further note that, with regard to section 4(B)(1)(d), the rule now specifies that the Terms of Service document must notify customers if their service agreement will auto-renew upon expiration of the contractual term. Also, we added a requirement that CEPs include a standardized form in the Terms of Service document, setting forth the requirements of the contractual agreement. The form required by this section will be developed by the Commission, and approval of the form is delegated to the Director of Electric and Natural Gas Industries. Renewals are discussed in more detail below regarding section 4(B)(6), renewals.

As noted in the Notice of Rulemaking, although the requirement to provide Terms of Service documents is contained in Chapter 305, the requirements regarding the actual content of the documents has been contained in Chapter 306-Uniform Information Disclosure and Informational Filing Requirements. The proposed rule incorporated the content requirements into Chapter 305 with additional language regarding auto renewals and clarifying language regarding customers' right of rescission, as explained above.[1] We received no further comment and otherwise adopt this provision as proposed.

Finally, the proposed rule removed language regarding the provision of disclosure labels. All such requirements are contained in Chapter 306. Additionally, the proposed rule removed an unnecessary provision on written solicitations that contain a tear-off portion. We received no comments on this amendment and have removed this language from our final rule as proposed.

2. Right of Rescission (Section 4(B)(2))

The proposed rules included several clarifying changes to the right of rescission provisions, including language that requires a minimum of five calendar days from the provision of the Terms of Service document to exercise rescission, and that CEPs must provide customers a minimum of eight calendar days if the Terms of Service document is mailed. In light of the proposed requirement in section 4(B)(1)(c) that Terms of Service documents be readily available on CEP websites, the proposed rule specified that, in the event a customer agrees to take service through a CEP website, the Terms of Service document will be considered provided at that time. The proposed rule also clarified and conformed the language in section (4)(B)(2)(d) regarding the waiting period required for enrollment to indicate that a CEP cannot enroll a customer until the end of the rescission period.

RESA commented that the proposed rule is inconsistent in its use of business days versus calendar days to define the rescission period, noting that the provisions regarding Terms of Service document content refer to the rescission period in terms of business days. Accordingly, we conform section (4)(B)(1)(d)(vii) to be

[1] We have issued a Notice of Rulemaking to remove the terms of service content requirements from Chapter 306. *Notice of Rulemaking,* Docket No. 2014-00215 (July 23, 2014).

consistent with section (4)(B)(2) by striking the words “five business day” from section (4)(B)(1)(d)(vii). The OPA commented that section 4(B)(2)(d) of the proposed rule is unclear and can be read to allow CEPs to enroll customers on the last day of the rescission period. To eliminate this lack of clarity, the OPA suggested that the rule specify that CEPs shall not enroll customers until the rescission period has expired. We agree with the OPA’s comment in this regard and adopt the OPA’s proposed language in the final rule.

3. Verification of Affirmative Customer Choice (Section 4(B)(3))

The proposed rule added a provision governing electronic authorization of service. The provision requires CEPs to electronically verify customer enrollment within one business day after receiving authorization, to confirm the validity of a customer’s e-mail address and identity, and to maintain an electronic record of the authorization. In the Notice of Rulemaking, we sought comment on whether the proposed provision on electronic authorization is sufficient or whether the rule should contain further details.

Gulf commented that the language regarding electronic confirmation of the identity of new customers is ambiguous and could create significant administrative delays and burdens if the requirement constituted more than requiring a CEP to send an acknowledgement receipt e-mail to the customer. Gulf requested that the Commission clarify that sending an acknowledgement e-mail to a new customer who signs up for service electronically is sufficient to confirm the customer’s agreement to accept service, the customer’s e-mail, and the customer’s identity. Similarly, NAPG requested that the Commission clarify how a CEP would confirm a customer’s identity. EM suggested that the rule should be further amended to allow confirmation of customer choice by recording oral authorization from a customer who contacts a CEP directly. At the Commission’s September 3, 2014 rulemaking hearing on this matter, EM further explained that, because it utilizes electronic confirmation only in those instances where a customer initiates a service request, it is confident that an e-mail alone is sufficient to confirm a customer’s agreement to accept service.

We agree with the comments of Gulf, NAPG, and EM, in part. We find it reasonable to utilize an e-mail address provided by a customer to provide verification notice to the customer regarding his or her agreement to enroll. Accordingly, we strike the requirement that CEPs obtain an acknowledgement of receipt from a customer to confirm the identity of a customer. We further clarify that an electronic copy of the authorization e-mail sent by the CEP to the customer must be retained. We do not, however, adopt EM’s suggestion that our rules authorize confirmation of customer choice by way of oral recordings of telephone calls. Such a recording is not sufficient to show a customer’s understanding of the CEP service being offered and the customer’s decision to enroll of that service. We otherwise adopt this requirement as drafted in the proposed rule.

The current rule contains a complaint procedure applicable to unauthorized service claims. The proposed rule deleted this provision and added a generally applicable complaint procedure to govern all disputes regarding customer protection rules (Section 4(B)(15)). We received no comments on this amendment and adopt it as drafted in our proposed rule.

4. Minimum Notice of Changes in Terms of Service (Section 4(B)(5))

The proposed rule added a requirement that customers affirmatively consent to continue to receive service under any change to the Terms of Service document in the same manner that customers consent to initial service. As specified in section 4(B)(1), the Terms of Service document contains all contractual obligations between the CEP and the customer and, therefore, any change of those terms essentially constitutes a new arrangement. This proposed provision also eliminates the word "material" with regard to changes in the Terms of Service document, and this is discussed in more detail with regard to section 4(B)(6) below. The proposed rule specified, in the event that a customer does not consent, the CEP must maintain service pursuant to the existing Terms of Service document through the existing contract term.

Gulf and CMP generally supported the changes, noting the appropriateness of measures to ensure proper notice and acceptance prior to a change in existing contractual terms of service. Brown noted, however, that—to the extent this provision would require maintaining service under the agreed upon terms beyond the term of the existing contract—this provision would expose CEPs to considerable risk that would be passed on to customers through increased rates. NAPG joined in the comments of Brown. EM and RESA expressed concern that, to the extent this provision was interpreted to apply to minor administrative changes or changes required by operation of law, the proposed rule revisions would be unworkable.

In view of the concerns expressed in the comments, we clarify that the proposed provisions are not intended as an effort to create rights and obligations beyond those established by contract law. To that end, we strike the reference to maintaining service under existing terms of service absent affirmative customer consent, as parties' private causes of action in that regard are clearly established under contract law. We otherwise adopt the rule as proposed as an appropriate means to provide customers with notice of changes to their Terms of Service documents.

5. Renewals (Section 4(B)(6))

Pursuant to section 4(B)(6) of the proposed rule, CEPs would be required to provide written notice to customers between 30 and 60 calendar days in advance of a renewal of service, and include the words "contract renewal notice" in bold at either the top of a paper notice or in the subject line for notices sent electronically. Pursuant to the proposed section 4(B)(3), customers would have to affirmatively consent to the renewal of service if there was a material change in the

Terms of Service document. The proposed rule specifies further that any change in price or price structure would be a material change. In the event the renewal did not involve a material change, the proposed rule allows service to be renewed unless the customer affirmatively requests otherwise. The Commission received a series of comments on this proposed provision, with EM, NAPGA, Gulf, Brown, and RESA strongly opposed to these requirements, and certain modifications to the proposed rule are explained below.

EM opposed the modifications particularly as they would apply to fixed rate contracts. EM noted that the requirements would increase the risk to CEP suppliers, making it commercially impossible for CEPs to offer fixed rate products to residential and small commercial customers. This, it states, would place CEPs at a significant disadvantage relative to standard offer service. Brown joins in this concern regarding CEPs being at a disadvantage, adding that it may be impossible for CEPs to compete with standard offer service under these requirements. EM further observed that automatic renewals are commonly used for other residential and commercial services such as cellular telephone service, and that customers were unaccustomed to an affirmative renewal of such products. EM did, however, agree that in certain cases automatic renewal could create consumer protection concerns, such as has been observed in Maine for variable and fixed-to-variable products, and supported the proposed rule in this regard if it were limited to variable and fixed-to-variable contracts.

Gulf, NAPG, and RESA also filed comments in opposition, suggesting that the proposed revisions override the last expressed wish of customers with regard to choosing to receive service from a customer's current CEP. Gulf argued that requiring affirmative renewal by customers would result in an undue burden on customers with the result of large numbers of such customers reverting to standard offer service, not by affirmative choice, but due to inattention. NAPG expressed a similar sentiment, stating that requiring affirmative consent will not allow customers to renew with their CEP and force them to return to standard offer service. RESA argued that automatic renewals are consistent with the expectation of customers and noted that some customers may have negotiated automatic renewal terms in conjunction with an initial agreement. These results, Gulf argues, could impact the future costs of both standard offer service and CEP service.

CMP, Emera, and the OPA also filed comments regarding this section. They expressed concern about the use of the term "material," and noted an inconsistency in that the term "material" had been deleted from the section 4(B)(5) with respect to changes to the Terms of Service document. CMP suggests that use of the term "material" would open the door for disputes about whether a particular change is or is not material. Thus, CMP and Emera suggested that affirmative consent be required for any change in the context of renewal as well as a section 4(B)(5) change. The OPA suggested merging sections 4(B)(5) and 4(B)(6), requiring affirmative consent for any change in the term of the contract or the termination fee. The OPA further suggested that renewal of a fixed rate contracts should require consent only where the new rate would be 1¢/kWh or more higher than the rate under the prior agreement. The OPA

also commented that affirmative consent should not be required if the change is required by events outside of the control of the supplier, such as a tax or regulatory change, and would apply equally to the entire market.

Several CEPs provided comments at the hearing, echoing the written comments received on the issue of automatic renewals. Constellation explained that, if a customer does not express a new preference, he or she should remain with the last supplier chosen, that is, the CEP. Gulf stated that acquiring a customer back from standard offer under these circumstances would result in unnecessary additional marketing costs that, in turn, would increase rates. EM pressed its point that auto renewal of its fixed rate contracts is, essentially, the underlying collateral for its supply agreements. Thus, it states, prohibiting automatic renewals would prevent EM from buying electricity strategically. Regarding the suggestions that contracts should not be allowed to automatically renew where the rate changes by more than a set amount or there is a change to the length of obligation, EM explained such a requirement would impact its ability to hedge its supply agreements, forcing it to raise its prices. EM and Constellation emphasized that, rather than prohibiting automatic renewal, advance notice of the terms at which a contract would be renewed was an appropriate means to educate and protect customers. Constellation encouraged the Commission to consider providing guidance and uniformity with respect to the visibility, delivery, and content of renewal notices.

Following the hearing and further comment, the OPA ultimately recommended that, rather than requiring affirmative consent for a renewal, Chapter 305 require a clear and concise renewal notice to customers (which CEPs must be able to prove was sent) along with a standardized uniform disclosure form of the terms of the renewal. The OPA submitted a sample renewal disclosure form, indicating a space to disclose price, whether the price is fixed or variable, the length of obligation if any, terminations fees, and any other unique attributes.

As a preliminary matter, the Commission notes that, for the reasons raised in the comments, the word “material” is stricken from our final rule. Removal of this term creates consistency between sections 4(B)(5) and 4(B)(6) of the rule.

The Commission appreciates the concerns expressed in comment regarding the need to adopt a rule that strikes the proper balance between providing for appropriate customer protection and maintaining the viability of competitive prices in the CEP market. For this reason, we have modified our proposed rule in a series of ways as set forth below. Generally, the rule allows automatic renewals, and under certain circumstances additional conditions are put in place to adequately protect customer interests at the time of renewals.

As a measure toward ensuring customers receive notice of an upcoming renewal of service, the rule has been modified to require CEPs to provide written notice to its customers twice in advance of renewal. CEPs may provide the two required written notifications either electronically or by US Postal Service. Further,

CEPs must maintain records of the sent notices for at least 12 months from the date the second notice is sent. Finally, as suggested by the OPA, the renewal notices must include a standardized notice form, setting forth the requirements of the Terms of Service document upon renewal. The forms required by this section will be developed by the Commission, and approval of the forms is delegated to the Director of Electric and Natural Gas Industries.

Contracts providing service at a fixed rate that will renew at a fixed rate may automatically renew provided that the obligation term of the renewed contract may not exceed the term of original contract or 18 months, whichever is longer.

As a further measure toward ensuring customers' interests are protected with respect to variable rates, at sections 1(B)(24) & (25) we adopt a modified definition and a new definition regarding rates and charges that vary. An "Indexed Variable Rate or Charge" is any rate or charge that varies over the term of a contract where the rate is reasonably related to a public index or otherwise reasonably determined through a readily accessible formula. Such a rate provides customers with reasonably defined parameters of how their rate may vary over the term of the contract. A "Non-indexed Variable Rate or Charge" is any rate or charge that varies over the term of the contract other than an Indexed Variable Rate or Charge. Here, where the means by which a rate may vary are less transparent, additional consumer protections are warranted as set forth below. Additional discussion on variable rates and charges is set forth further below with regard to section 4(B)(8), variable rates and charges.

Contracts providing service at a variable rate that will renew at an indexed variable rate as defined in section 1(B)(24) may automatically renew provided, however, that the term of the renewed contract may not exceed the obligation term of the original contract or 18 months, whichever is longer.

If the rate offered in the renewal contract is not fixed or will vary as set forth in section 1(B)(25), then the contract may automatically renew but only on a month to month basis.

Contracts providing service at a variable rate that will renew at a fixed rate may automatically renew.

6. Assignments (Section 4(B)(7))

The proposed rule required CEPs to provide written notice to its customers between 30 and 60 days in advance of any assignment of the service obligation, and specified that a customer must affirmatively consent to any material change in the terms of service pursuant to the provision of section 4(B)(3) of this Chapter. In the absence of such consent, a CEP that is assigned customer accounts must provide service in compliance with existing terms of service.

NAPG and RESA oppose the notification requirement of the proposed rule, arguing that it could impede normal contract transfers and potentially stop market consolidation. CMP suggests that customers should be informed at the time of establishing service with a CEP as to whether their contract could be assigned, and that customers should be given an opportunity to opt out if their contract is assigned to another CEP. RESA responded by explaining that contract law generally allows contracts to be assigned, absent a change to the duties and obligations under the contract. RESA suggested instead that directing CEPs to comply with whatever notice of assignments is required by their contracts with customers would be a preferable alternative. NAPG does not dispute that assignees are subject to existing terms or conditions, and thus suggests an opt-out provision would be a better means of addressing circumstances where an assignee was changing the existing terms of service upon assignment.

EM does not disagree with the proposed notice requirement and requirement of affirmative consent for changes to the terms of service upon assignment, but it expressed concern with respect to assignment of customer accounts as collateral security. In those situations, it states, the CEP is not at that time transferring the service obligation, and that the secured party may, upon exercising its assignment right at a later date, be unable to provide notice in advance of an immediate need to assume the CEP's service obligation. EM suggests that an exception be carved out for collateral security assignments.

As a preliminary matter, the Commission notes that, for the reasons raised in the comments, the word "material" is stricken from section 4(B)(7) of the rule. Removal of the term creates consistency between this section and sections 4(B)(5) and 4(B)(6) of the rule.

In view of the parties' comments, we modify the rule to provide that CEPs must give notice in advance of assignment if the assignment will result in a change in the terms of service. If there is no change in the terms of service, then notice must be provided to customers by either electronic or postal means, no later than 30 days after the assignment. With regard to EM's concern, we note that this provision's advance notice requirement is only applicable when there is a contractual change in the terms of service. CEPs must maintain records that the notice was sent for at least 12 months from the date the notice is sent.

7. Variable Rates and Charges (Section 4(B)(8))

The proposed rule contained a new provision governing variable rate arrangements. This provision states that a such a rate must be based on a market rate or index that is reasonably reflective of market condition and requires that CEPs clearly specify in the Terms of Service document and on their webpages the formula and/or market indices by which the variable rate will be calculated; any limit on how high the rates or charges may rise; and the rates that the formula and/or index would have produced over the immediately prior 12-month period. In addition, for rates that are

established in advance of the billing period, CEPs are required to notify customers at least one week in advance of any change in the applicable rate and may not change the rate more than once in a billing period.

RESA commented that the requirement that variable rates be specified in terms of an index or formula should not be adopted. RESA noted that not all variable rates and charges are calculated using an index or formula, nor should they be. NAPG also opposed this requirement, noting that customers that want that type of variable rate can seek out suppliers that offer indexed products. RESA and NAPG also opposed the requirement that CEPs offering variable rates must provide information on their webpages showing the rates the index or formula would have produced over the prior year. NAPG suggested as an alternative that the rule require CEPs to post the actual rates charged for the product over the prior year. Finally, RESA and NAPG also opposed the provision in the proposed rule that would require pre-notification to customers, pointing out that customers receiving variable rate products already know from the Terms of Service document that their rates will vary, whether there is a cap and, if so, what the cap is.

The OPA expressed a general concern about variable rates and their effect on customers, noting that a CEP might unilaterally increase rates well above a normal markup over wholesale costs and/or that existing market volatility could lead to very high rates. A CEP customer, Mr. Norm Viger, submitted written and oral comments at the hearing, exemplifying the OPA's concerns. Mr. Viger explained that his original CEP fixed rate plan changed to a variable rate plan after a three-month term, resulting in increasing electricity payments over the August 2013 through March 2014 time period of almost double the standard offer price. In its reply comments, the OPA noted that, even though variable rate plans are causing considerable pain in this era of escalating prices, they should not be prohibited because, as market prices come down, they can be beneficial to customers. The OPA, however, notes that there should be protections for consumers in the forms of notice and uniform disclosure of terms, as well as monthly advanced disclosure of upcoming prices.

The Commission received additional comment from Constellation on variable rate pricing at the public hearing. Constellation stated that restricting the price of the product would draw the Commission into the regulation of CEP prices in the marketplace, and that ensuring that adequate notice provisions are in place would be preferable. In that regard, CMP noted its conclusion that the vast majority of CEP customers on variable prices last winter did not realize they were on variable price plans and had no advance notice of increasing prices. As to requiring variable rates to be indexed, Constellation explained that, while it understood the Commission's concern about price gouging, price would be disciplined through competition in the marketplace, provided there is adequate notice. Constellation encouraged the use of a disclosure requirement as to whether a variable price is capped as means of providing additional customer protection.

In their reply comments, RESA and NAPG continued to express concerns about how inflexible provisions in the proposed rule regarding indexing variable rates would stifle innovation and would be un-administrable in practice. They renewed their suggestion that revised notice and disclosure requirements would protect customer interests, and that requiring variable prices to be indexed would be ineffective and damaging to the CEP marketplace.

In view of the CEPs comments and as identified above, we adopt a modified definition and a new definition with regard to variable rates and charges. The definitions set forth at sections 1(B)(24) & (25) provide CEPs with the flexibility to offer variable rates and charges that are not linked to an index or formula, but, as discussed above, we require additional protections with respect to renewals of non-indexed variable rate agreements. In response to CEP comments we also modify the rule to allow CEPs to notify customers of changes in rates or charges by posting the change on the provider's website. For the reasons identified by the OPA and consumers, we otherwise adopt the rule as drafted with regard to the disclosure and notice requirements set forth in section 4(B)(8).

8. Termination Fees (Section 4(B)(9))

The proposed rule added a requirement that termination fees must be a fixed dollar amount, and may not be established by formula. The Commission requested comments on whether there should be a cap on termination fees. The Commission also requested comments on whether terminations fees should not be allowed in conjunction with variable rates.

Gulf noted its support for a fixed termination fee for residential customers, but commented that a fixed fee for small commercial customers would be inappropriate given the wide variance in size and usage patterns, and would incent CEPs to charge termination fees at the higher end, thereby unfairly burdening relatively lower use customers. NAPG also opposed requiring a fixed termination fee, noting that it would not capture differences in costs associated with contracts of different lengths of obligation or remaining terms. RESA opposed capping termination fees, noting that CEPs should be able to recoup the costs of forward power purchases and hedges from the customer who strands them by terminating service prior to the conclusion of a contract. CMP took no position on the specifics of how termination fees should be calculated, but suggested that the rule include language specifying that a CEP is solely responsible for billing and collecting any such fee.

As set forth in the proposed rule, the provisions regarding termination fees would apply only to residential and small non-residential customers. This limitation on applicability provides the CEPs with flexibility in negotiating termination fee clauses with respect to larger customers with more diverse usage levels and patterns. While the Commission understands the CEPs' need to recoup costs when customers break service contracts, some regulatory oversight is necessary to ensure termination fees do not become unreasonably confiscatory and consumers are

unable to exercise choice in the marketplace. Thus, we adopt the rule as proposed, concluding fixed termination fees without setting a cap properly balances the interests of competitive electricity marketplace and consumer interests. We do modify this proposed provision, however, with respect to month-to-month contracts. Because with month-to-month service contracts the risk exposure to CEPs is limited, the proposed provision has been modified to prohibit termination fees for month to month customers whose terms of service provide for an Indexed Variable Rate or Charge or a Non-indexed Variable Rate or Charge. We otherwise conclude the rule properly allocates the risk between the CEPs and consumers, and adopt the rule as proposed.

9. Promotional Practices (Section 4(B)(10))

The proposed rule contained new provisions regarding CEP promotional practices. These included a requirement that any comparison of customer savings relative to standard offer service must clearly include a comparison of rates that will be in effect during the same period as the CEP rate.

RESA opposed this requirement, arguing that it would be unnecessarily restrictive as it would only permit CEPs to compare their product offerings to standard offer service if the standard offer price were known for the entire period of the CEP product offering.

The purpose of the provision in the proposed rule is to prevent CEPs from providing customer savings comparisons based on standard offer prices that will not be in effect during the term of the CEP product. For example, CEPs would be precluded from providing comparisons based on past or current standard offer prices, if such prices would not be in effect during the CEP product term. The provision in the proposed rule is not intended to be limiting in the way suggested by RESA.

The proposed rule also contained a requirement that a CEP may not state, suggest, or imply any affiliation or association with a transmission and distribution utility. CMP and Emera Maine indicated support for this requirement. CMP noted that it has received an alarming number of complaints from customers indicating that CEPs have stated or implied affiliation with CMP. CMP suggested that the rule include a requirement that when contacting a customer a CEP must immediately state the name of its company and the purpose of the call. Emera Maine suggested that, in addition, the rule include a requirement that CEPs clearly and conspicuously indicate in all promotional materials that it is not affiliated or associated with any transmission and distribution utility. The OPA also commented in support of this requirement, noting that customers are sometimes confused by the distinction between transmission and distribution utilities and CEPs, and suggested that CEPs be required to make a statement on their websites that they are not associated with the transmission and distribution utility.

We agree with the additional requirements proposed by CMP, Emera Maine and the OPA and will include them in the final rule.

10. Trade Practices (Section 4(B)(11))

The proposed rule added general provisions regarding unfair trade practices. The provision specified that CEPs shall not engage in any unfair or deceptive act or practice that would create a likelihood of confusion in connection with the offer for the sale of electricity. The provision stated that it does not affect other unfair trade practices laws or rules. We received no comments on this section and accordingly adopt the section as drafted in the proposed rule.

11. Cancellation of Service (Section 4(B)(12))

The proposed rule added clarifying language to the cancellation of service provisions and a requirement that CEPs send an EDI transaction notifying the applicable transmission and distribution utility of the cancellation of service within two business days of notice of a customer cancellation. CMP proposed adding language to the rule that would clarify that CEPs are responsible for taking all necessary actions to effectuate a cancellation request from a customer, including submitting all required EDI transactions. We receive no other comments on this provision. We agree with CMP's suggestion, and will reflect it in the final rule.

12. Generation Service Bills (Section 4(B)(13))

The proposed rule included several changes to the provision governing generation service bills. These included the removal of impractical requirements, such as including the pricing formula contained in the Terms of Service document and comparative information for the prior twelve month period. The proposed rule also clarified that arrearage information on the bills be consistent with the requirements of Chapter 322. We received no comments on this section and accordingly adopt the section as drafted in the proposed rule.

13. Dispute Resolution and Complaint Procedure (Section 4(B)(15))

The proposed rule added a dispute resolution and complaint procedure that is generally applicable to residential and small commercial customer service. RESA commented that the time frame for response to CAD inquiries (48 hours) was inconsistent with other provisions of Commission rules that require CEPs to have employees available only during business hours. In the event that CEPs did not have employees working on the weekends, RESA posits the impossibility of responding to an after-hours request from CAD submitted on a Friday without hiring additional employees. We recognize the limitations that small CEPs face in this regard and have added a provision to our final rule that CEPs may respond to requests arriving after normal business hours on Friday by noon on Monday.

N. Disclosure Label (Section 4(D))

The proposed rule explicitly required a CEP to prominently display on its website a disclosure label that complies with Chapter 306 of the Commission rules and further requires that the label be available and easily accessed on the webpage without any requirement that any personal or customer-specific information be provided. We received no comments on this section and adopt the amendments as drafted in the proposed rule.

O. Information Filings (Section 5)

Currently, Chapter 306, Section 3 of our rules, which primarily governs the requirements for the development and provision of disclosure labels, contains provisions on the filing of information with the Commission. These provisions, which require the filing of generally available terms of service, are more appropriately contained in Chapter 305. Accordingly, the proposed rule moved these provisions to section 5 and adds a requirement that the information also be provided to the Public Advocate. We received no comments on this section and adopt the amendments as drafted in the proposed rule.

Accordingly, we

O R D E R

1. That the attached amended Chapter 305, Licensing Requirements, Annual Reporting, Enforcement and Consumer Protection Provisions for Competitive Provision of Electricity, is hereby approved;

2. That the Administrative Director shall file the amended rule and related materials with the Secretary of State;

3. That the Administrative Director shall notify the following of this rulemaking proceeding:

    a. All utilities operating in the State;
    b. All persons who have filed with the Commission within the past year a written request for notice of rulemakings;
    c. All persons that have commented in this rulemaking proceeding;

4. That the Administrative Director shall send copies of this Order and the attached amended rule to the Executive Director of the Legislative Council, 115 State House Station, Augusta, Maine 04333-0115 (20 copies).

Dated at Hallowell, Maine, this 14th day of January, 2015.

BY ORDER OF THE COMMISSION

/s/ Harry Lanphear
Harry Lanphear
Administrative Director

COMMISSIONERS VOTING FOR: Vannoy
Littell

NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of review or appeal of PUC decisions at the conclusion of an adjudicatory proceeding are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 11(D) of the Commission's Rules of Practice and Procedure (65-407 C.M.R. 110) within **20** days of the date of the Order by filing a petition with the Commission stating the grounds upon which reconsideration is sought. Any petition not granted within **20** days from the date of filing is denied.

2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within **21** days of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S. § 1320(1)-(4) and the Maine Rules of Appellate Procedure.

3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S. § 1320(5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.